(1)

90-590

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MATTHEW FOLLETT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the inclusion of blotter paper weight with the actual LSD in determining the weight of the controlled substance contravenes congressional intent, violates the defendant's rights to equal protection and leads to disparate and unfair results.

II. Whether a defendant who unquestionably suffers from severe mental disorders, stemming from his childhood, should receive a downward departure from the applicable sentencing guidelines range based upon a diminished mental capacity, pursuant to Federal Sentencing Guidelines Section 5K2.13, embodied in Title 18 U.S.C. Section 3553.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PRAYER

Petitioner Matthew Follett ("Follett") respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals affirming the sentence imposed by the district court in this case, entered June 1, 1990, is reported at 905 F.2d 195 (8th Cir. 1990) and is attached hereto in Appendix A. The judgment and order of the United States District Court

for the Southern District of Iowa (Judge Wolle), entered August 18, 1989, is attached hereto in Appendix B.

JURISDICTION

On June 1, 1990, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the United States District Court and the sentence imposed upon petitioner Matthew Follett. A Petition for Rehearing was denied on July 5, 1990. (See order attached in Appendix C.) This Petition is filed within ninety (90) days of said order, and jurisdiction is invoked under Title 28 U.S.C., Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

Title 21 U.S.C. §841(a)(1) provides in pertinent part:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly and intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . ."

Title 21 U.S.C. §841(b)(1)(B)(v) provides in pertinent part:

> "In the case of a violation of subsection (a) of this section involving . . . one gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD); such person shall be sentenced to a term of imprisonment which may not be less than five years and not more than forty years and if death or serious bodily injury results from the use of such substance shall not be less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than and individual or both . . ."

Title 18 U.S.C. §3553(b) provides in pertinent part:

> "The court shall impose a sentence of the kind, and within the range, referred to in Section (a)(4) unless the court finds that there exists aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

Federal Sentencing Guidelines §2D1.1 provides in pertinent part:

> ". . . A Base Offense Level of . . . 30 will apply for a violation of 21 U.S.C. §841(b)(1)(B) involving . . . at least 7G but less that 10G of LSD . . ."

Federal Sentencing Guidelines §3E1.1 provides in pertinent part:

(a) "If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels."

(b) "A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial."

(c) "A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."

Federal Sentencing Guidelines §5K2.13 provides in pertinent part:

"If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public."

STATEMENT OF THE CASE

Petitioner, Matthew Follett, a nineteen year old, first offender with acknowledged mental problems bordering on psychosis, pled guilty to possessing approximately 2,500 dosage units of lysergic acid diethylamide (L.S.D.) with intent to deliver, in violation of Title 21 U.S.C. §841(a)(i), and (b)(i)(B)(v). Each of these dosage units contained L.S.D.

impregnated in blotter paper. The government did not recover any L.S.D. from Follett; the 2,500 figure was based upon an estimate given by Follett's supplier during testimony before the grand jury. The plea agreement stated that, subject to Follett's objection to including the carrier blotter paper weight in determining the weight of L.S.D. for purposes of sentencing, Follett possessed more than a gram of L.S.D., and could have reasonably foreseen the involvement of 7 to 9.9 grams of L.S.D. The 7 to 9.9 gram figure includes the active L.S.D. agent as well as the weight of the blotter paper on which it is carried.

In determining the base offense level, Judge Wolle included the weight of the carrier paper in calculating the amount of narcotics involved in this case. Pursuant to Federal Sentencing Guidelines Section 3E1.1, the offense level was reduced by two (2) points because of Follett's acceptance of responsibility. The trial court denied Follett's request for a downward departure based on his diminished mental capacity, which unquestionably stemmed from his early childhood, and which was documented by an abundance of psychiatric records, several of which were tendered to the trial court and made part of the record in this case. On August 18, 1990, utilizing an adjusted offense level of 28, Judge Wolle sentenced Follett to eighty-four (84) months in custody,[1] four (4) years supervised release, a twenty thousand dollar ($20,000.00) fine, and assessed all costs of incarceration.

Follett appealed his sentence to the Eighth Circuit Court of Appeals. On June 1, 1990, Follett's sentence was af-

[1] On August 17, 1990, the government filed a motion to reduce the defendant's sentence pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure. On September 12, 1990, Follett's sentence was reduced to forty-eight (48) months in custody.

firmed by the Appellate Court, with one member of the three judge panel voicing strong concern that Follett's mental disorders were not accorded enough consideration by the trial court, and that a departure under the circumstances of this case would "serve the interests of society and the defendant better than the sentence imposed". Follett now petitions this Honorable Court to issue a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I.

THE EIGHTH CIRCUIT'S HOLDING THAT THE WEIGHT OF BLOTTER CARRIER PAPER IN WHICH L.S.D. IS IMPREGNATED SHOULD BE INCLUDED WITH THE WEIGHT OF THE ACTUAL L.S.D. IN CALCULATING THE WEIGHT OF THE CONTROLLED SUBSTANCE FOR PURPOSES OF SENTENCING CONTRAVENES CONGRESSIONAL INTENT UNDERLYING TITLE 21 U.S.C. §841 AND FEDERAL SENTENCING GUIDELINES §2D1.1, VIOLATES THE DEFENDANT'S EQUAL PROTECTION RIGHTS AND IS IN CONFLICT WITH OTHER DECISIONS ON THIS ISSUE.

The issue involved in this case is a subject of national confusion, and must be resolved by this Court, lest each district court judge and separate judicial circuit be accorded unbridled reign to interpret this federal statute in whatever manner they deem appropriate.

The language of the federal drug statute contained at Title 21 U.S.C. §841 and Federal Sentencing Guideline §2D1.1, seemingly fixes sentences for L.S.D. distribution

based on the weight of the "mixture or substance containing a detectable amount of L.S.D." L.S.D. is made in liquid form, and is generally impregnated into some type of carrier for purposes of ingestion. Matthew Follett was in possession of approximately .003 grams of actual L.S.D., which was impregnated into twenty-five hundred (2500) squares of blotter paper (commonly referred to as "dosage units").[2]

The critical issue in these cases is whether the carrier paper is a "mixture or substance" containing L.S.D. within the meaning of the statute and/or guidelines, and thus should weighed and calculated in determining the appropriate sentence. The phrase "mixture or substance" as used in the guidelines has the same meaning as it has in Title 21 U.S.C. §841. *See* U.S.S.C. Guidelines Manual at 2.46. However, the statutory definition section applicable to these provisions, Title 21 U.S.C. §802, does not define "mixture" or "substance". Thus, the question of whether impregnated blotter paper is a "mixture or substance" containing L.S.D. is a matter left unresolved by the face of the statute and the guidelines.[3]

Several courts have summarily concluded that because the statute specifically reads "more than one gram of a mixture or substance containing a detectable amount of

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[2] As a bit of background, the user is then expected to place a square of blotter paper in his mouth in order to ingest the L.S.D. Whether or not the paper is swallowed is a matter of preference for the user.

[3] Indeed, on November 30, 1988, sentencing guidelines publication entitled "Questions Most Frequently Asked About the Sentencing Guidelines" stated that the commission has not yet taken a position on issue of whether blotter paper should be included in the weight of the controlled substance.

L.S.D." as opposed to "a gram of L.S.D.", this demonstrates Congress was aware of the difference between L.S.D. and L.S.D. combined with a "carrier substance". *See e.g. United States v. McGeehan*, 824 F.2d 677 (8th Cir. 1987), *cert. denied* 108 S.Ct. 1017 (1988), *United States v. Rose*, 881 F.2d 386 (7th Cir. 1989), *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990), *United States v. Bishop*, 894 F.2d 981 (8th Cir. 1990), *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989), *United States v. Daly*, 883 F.2d 313 (4th Cir. 1989). However, this conclusion is based on a faulty premise, as L.S.D. impregnated blotter paper is not a "mixture" or "substance" within the meaning of this statute. In this case, Professor Robert M. Moriarty, a professor of chemistry at the University of Illinois, Chicago, submitted a report, which was made part of the record in this case, indicating there was no scientific basis at all in which to include the paper weight as part of the weight of this controlled substance. Indeed, the report clearly indicated that, at most, less than one (1) percent of the entire weight of the narcotics at issue in this case was actually L.S.D., the other ninety-nine (99) percent being paper weight.

Other courts have recently conducted a more in depth analysis into this issue and have more appropriately concluded that the weight of blotter paper should not be considered in calculating the drug weight under these circumstances. *See e.g. United States v. Healy*, 729 F. Supp. 140 (D.D.C. 1990). A "substance" is a "species of matter of a definite chemical compound" or "any particular kind of corporeal matter." 17 *Oxford English Dictionary* 64 (1989). A "mixture", which is defined as a "coexistence of different ingredients or different groups or classes of things mutually diffused through each other." 9 *Oxford English*

Dictionary 921 (1989). By definition, L.S.D. impregnated blotter paper does not qualify as either a "mixture" or "substance". Indeed, some courts have speculated that Congress may have intended the terms "mixture" or "substance" to refer to a liquid into which L.S.D. tartrate has been dissolved, as opposed to a carrier in which it has been impregnated. *See eg. Healy*, 729 F. Supp at 143.

The petitioner in this case, a nineteen (19) year old first offender in possession of twenty-five hundred (2500) dosage units of L.S.D., with an estimated street value of approximately twenty-five hundred ($2500) dollars, was treated with the same severity as a major narcotics dealer, responsible for the distribution of kilogram quantities of cocaine and heroin. *See* Title 18 U.S.C. §841(b)(i)(B)(v). Congress did not intend for this to be the result. One strong indication buttressing this conclusion is a judicial finding of congressional intent enunciated in *United States v. McGeehan*, 824 F.2d 677, 681 (8th Cir. 1987), in which the court examined the relationship between the 1981 and 1986 amendments to §841 and the legislative history, and concluded "the enhanced sentencing provisions of §841 were not intended to reach a distributor of one thousand (1000) or even five thousand (5000) dosage units of L.S.D." *Id.* These enhanced sentences under §841 apply to defendants who possess or sell more than one (1) gram of "a mixture or substance containing a detectable amount of L.S.D.," yet without the weight of the carrier paper in this case, the amount of actual L.S.D. involved in is substantially less than one gram.

Congressional intent in this regard is further evidenced by the fact that on May 1, 1990, the United States Sentencing Commission sent to Congress proposed amendments

to the Federal Sentencing Guidelines, specifically suggesting §2D1.1 be modified to reflect the *actual* weight of certain controlled substances, such as L.S.D., where "the aggregate weight of the mixture or substance containing the drug tends to grossly exaggerate the actual weight of the active drug for sentencing purposes." While the amendment has not yet become effective, it is presently the subject of much discussion in the legislature.

It is well settled that "ambiguity concerning the ambit of criminal statutes should be resolved in a favor of lenity," *Ruiz v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971), and the same principal is appropriate in this case, as the guidelines certainly have the effect of statutory provisions on convicted persons. Consequently, any ambiguity in the guidelines with respect to whether L.S.D. impregnated blotter paper is a "mixture" or "substance" containing L.S.D. must be resolved in favor of the defendant.

Excluding blotter paper weight under these circumstances also comports with the general goal of the guidelines as mandated by Congress, namely uniformity in sentencing. *U.S.S.G.* at §1.2. Because the weights of the various L.S.D. mediums—paper, sugar cubes, capsules—are being taken into account by some courts in this country, widely divergent sentences may and are being imposed for the sale of identical amounts of a controlled substance. *United States v. Daly*, 883 F.2d 313, 316-318 (4th Cir. 1989). It is not only illogical to graduate the severity of L.S.D. sentences based on the weight of these carrier mediums, but this practice also violates the defendants' rights to equal protection under the laws. Graduation of sentences based on market value or number of dosages is far more sensible and fair, as that would ef-

fectively punish defendants on the basis of their individual significance in the drug supply chain or the harm the distribution posed to society.

In sum, the statute and guidelines do not clearly mandate that L.S.D. blotter paper be calculated in weight of the controlled substance at issue. In fact, legislative history and Congress' recently proposed amendments, as well as policy and legal considerations suggest it not be weighed. For these reasons the Eighth Circuit's decision affirming the inclusion of the carrier weight in calculating the sentence imposed contravenes congressional intent, violates the defendant's equal protection rights, and is in conflict with other decisions in this area. Thus, this petition should be granted to remedy the injustice here, and resolve the national confusion surrounding this issue.

II.

THE EIGHTH CIRCUIT'S HOLDING THAT A DEFENDANT SUFFERING FROM SEVERE MENTAL DISORDERS STEMMING FROM HIS YOUTH WAS NOT ENTITLED TO A DOWNWARD DEPARTURE FROM THE APPLICABLE SENTENCING GUIDELINES RANGE WAS CLEARLY ERRONEOUS, AND SETS A DANGEROUS PRECEDENT IN THIS AREA.

There is no dispute that petitioner Matthew Follett is a severely troubled young man with psychological problems stemming from his early childhood. Beginning at the age of twelve (12), Matthew was sent to a psychologist for treatment for dysfunctional behavior in school. It was then determined that Matthew needed intensive treatment. He began psychotherapy at the age of twelve (12), and was placed on medication for treatment of his condi-

tion. His psychological problems worsened and at the age of sixteen (16) Matthew attempted suicide on the night of his junior prom. He was institutionalized for several months thereafter and again placed on daily medication to control his condition. His psychological problems have indeed necessitated ongoing medical treatment throughout his life.

At the time of his involvement in the instant offense, Follett was a freshman at the University of Iowa. One month prior to Follett's involvement in this offense, he was diagnosed by psychologists as suffering from an attention deficit disorder, with hyperactivity noted through his impulsivity and poor academic performance. While Matthew was again placed on medication to control his condition, the medication interfered with his ability to concentrate on school work, and thus he eventually had to stop taking the medicine. All psychological reports which were submitted and made part of the record in this case evidenced that throughout his childhood and development, Matthew could not control his impulses, and he has been diagnosed by virtually every treating psychiatrist who has examined him as suffering from major depression, passive-aggressive disorders, and uncontrollable impulsive features.

Federal Sentencing Guidelines §5K2.13 clearly provides for departure from the applicable guidelines range when the defendant commits a non-violent crime while suffering from a significantly reduced mental capacity, which was not resulting from use of drugs or intoxicants, if the mental capacity contributed to the crime and if incarceration is not needed for protection of society. *See U.S.S.G.* at §5K2.13. The commentary to this guidelines section provides that while voluntary drug abuse should not merit a departure, reduced mental capacity is not voluntary and

does affect the ability of a person to function within legal strictures.

In this case, Matthew Follett's treating psychologist concluded that "although intellectually [Follett] can understand somewhat of the nature of his problems, at an emotional level there is almost nothing at present he can do about it." *See App. A.* Indeed, his doctors concluded that "at the time of the crime, [Follett] was suffering from a severe mental disorder—being close to psychosis—major depression, 296.3, with a mixed personality disorder, 301.89, with narcissistic, passive-aggressive and impulsive features." *Id.*

Based on the psychiatric reports submitted in this case, one member of the three judge panel issued a vehement dissent from the trial court's refusal to issue a downward departure based on diminished capacity, and recommended that Follett be resentenced, with the district court giving due and full consideration to Follett's mental disorders. The dissenting judge of the Eighth Circuit clearly opined that under these circumstances, "a departure will serve the interests of society and the defendant better than the sentence imposed" in this case. *See App. A.* For these reasons, this Court should grant the writ as to this issue, to establish parameters as to what constitutes diminished capacity warranting a downward departure.

CONCLUSION

WHEREFORE, petitioner Matthew Follett respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 89-2386

United States of America,

Appellee,

v.

Matthew Follett,

Appellant.

Appeal from the United States District Court
for the Southern District of Iowa

Submitted: March 8, 1990
Filed: June 1, 1990

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

McMILLIAN, Circuit Judge.

Matthew Follett appeals from a final judgment entered in the District Court[1] for the Southern District of Iowa

[1] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

finding him guilty, following a guilty plea, of possession with intent to distribute 2,500 dosage units of LSD in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(v). The district court sentenced Follett to 84 months imprisonment, 4 years supervised release, a $20,000 fine, and a $50 special assessment, plus the costs of incarceration and supervised release. For reversal, Follett argues the district court erred in (1) refusing to depart downward from the applicable guideline sentencing range because of his psychological problems and diminished mental capacity, (2) finding that he was not a minor participant, (3) holding the sentencing guidelines are not unconstitutional, and (4) calculating the quantity of drugs involved in the offense. For the reasons discussed below, we affirm the judgment of the district court.

This case arose out of the related cases of William Emanuel and Michael McGuire, who were involved in the distribution of LSD in and around Iowa City, Iowa. After his arrest Emanuel, who was Follett's supplier, called Follett to discuss a drug transaction. Follett told Emanuel that he had sold 20 sheets of LSD in 7 days and had customers waiting for approximately 15-30 sheets of LSD. Emanuel told Follett that he did not want to "touch anything" because of his arrest. Follett agreed to deal directly with Emanuel's supplier in California. Follett was unable to complete the transaction because the California supplier refused to make any sales involving Emanuel following Emanuel's arrest. Although no controlled purchase was ever made from Follett, Emanuel testified to a grand jury that he had sold Follett approximately 2,500 dosage units of LSD.

Follett was initially charged with possession with intent to distribute in excess of 10 grams of LSD in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(v), and conspiracy to

distribute LSD in violation of 21 U.S.C. § 846. Following plea negotiations, Follett was charged by information with possession with intent to distribute 2,500 dosage units of LSD in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(v). Follett entered a guilty plea. The plea agreement stipulated that, subject to Follett's objection to including the weight of the carrier paper to determine the total quantity of the drug involved, that Follett possessed in excess of 1 gram of a mixture or substance containing LSD, that he could have reasonably foreseen a total quantity of 7 to 9.9 grams of LSD, and that he had accepted responsibility. At the sentencing hearing, Follett presented evidence establishing that he has a history of psychological problems.

The district court found that the base offense level, based upon the quantity of LSD involved in the offense, which included the weight of the carrier paper, was 30, pursuant to Guidelines § 2D1.1(3), and then subtracted 2 points for acceptance of responsibility. The district court refused a 2 point reduction for minor participant status, Guidelines § 3B1.2, and refused to depart downward on the basis of diminished mental capacity, Guidelines § 5K2.13. The applicable guideline sentencing range at an adjusted offense level of 28 and criminal history category I is 78-97 months. The district court sentenced Follett to 84 months imprisonment, 4 years supervised release, a $20,000 fine, and a $50 special assessment, plus the costs of incarceration and supervised release. This appeal followed.

Follett first argues that the district court erred in refusing to depart downward on the basis of his psychological problems and diminished mental capacity. The district court's refusal to depart downward is not reviewable on appeal. *United States v. Evidente*, 894 F.2d 1000, 1004 (8th Cir. 1990).

Follett next argues the district court erred in failing to find that he was a minor participant pursuant to Guidelines § 3B1.2 and thus entitled to a 2 point reduction in the offense level. The district court's finding that Follett was not a minor participant is a finding of fact subject to review under the clearly erroneous standard. *See, e.g., United States v. Ellis*, 890 F.2d 1040, 1041 (8th Cir. 1989) (per curiam). The record adequately supports the district court's finding that Follett was not a minor participant. The district court's finding is not clearly erroneous.

Follett next argues that the sentencing guidelines are unconstitutional on several grounds. This court has upheld the sentencing guidelines against challenges on each ground Follett raises. *See United States v. Barnerd*, 887 F.2d 841, 842 (8th Cir. 1989) (per curiam) (guidelines do not unconstitutionally limit defendant's right to present evidence); *United States v. Lane*, 883 F.2d 56, 57 (8th Cir. 1989) (per curiam) (guidelines not unconstitutionally mechanical); *United States v. Nunley*, 873 F.2d 182, 186 (8th Cir. 1989) (no constitutional right to individualized sentence in non-capital cases).

Finally, Follett argues that the district court should not have included the weight of the carrier paper in determining the quantity of LSD. This argument was rejected in *United States v. Bishop*, 894 F.2d 981, 985-86 (8th Cir. 1990) (weight of distribution medium should be included in weight calculation).

Accordingly, the judgment of the district court is affirmed.

HEANEY, Senior Circuit Judge, dissenting.

I would remand this matter to the district court for resentencing because the sentence imposed is at once too severe and too lenient: too severe because it requires Follett to be confined for at least 74 months[1]—an inordinately long sentence for a 19-year-old first offender—and too lenient because it suggests that he be permitted to serve that time in a minimum security institution. Unfortunately, minimum security institutions have neither the personnel nor the facilities necessary to deal with individuals, like Follett, who have severe mental problems.

On the basis of the record that was submitted at the sentencing hearing, Follett suffers "from a severe mental disorder—being close to psychosis—major depression, 296.3, with a mixed personality disorder, 301.89, with narcissistic, passive aggressive, and impulsive features." The record further indicates that Follett has abused alcohol and drugs since the age of 12 and has refused to undergo treatment to improve his condition. He has been in and out of psychotherapy throughout his life. The psychiatrist retained by the Follett family states:

> His mental status examination revealed a superficiality in his understanding and insights. There were no cognitive deficiencies in his ability to calculate, in his fund of knowledge, in his orientation or in his memory. His I.Q. appeared to be a bit above average from his clinical exam. He showed no insights whatsoever into the nature of any conflicts. . . .
>
> . . . He maintains only superficial emotional interests in people, situations, events, and even with his family. Thus he protects himself against chaotic, regressive and psychotic state of mind.

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[1] A comparable pre-Guidelines sentence would have been between five and forty years.

. . . [I]t has been extremely difficult for him to invest himself in a therapeutic relationship, be it in group or individual therapy. He simply appears to be, at the present time at least, incapable of withstanding the give and take at a deeper emotion level with individuals whom he basically regards with mistrust and suspicion and feels terrified by their presence. . . . [He appears to be] "a friend to everyone" but really a friend with nobody. Relationships are therefore superficial. He cannot make a commitment.

. . .

Although intellectually he can understand somewhat of the nature of his problems, at an emotional level there is almost nothing at present he can do about it.

. . .

. . . [H]e entered Northwestern Memorial Hospital in 1986 because of poor school performance and impulsive self-injurious behavior—slashing a tendon in his wrist when he punched out several windows in his home after arguments with his father and his girl friend . . . .

. . .

Psychological testing further revealed his self-image was inferior, humiliated and he felt revengeful.

. . .

Psycho-educational testing on 5-25-82, which was an evaluation by several school officials, also indicated that he displayed anxious, impulsive, distractable, hyperactive behavior throughout the interview and testing session. He was clearly described as being a classical hyperactive person who needed medication and indeed was prescribed Ritalin. . . . He was evaluated even back then as impulsive socially, emotionally immature, and appeared to be over-compensating for feelings of depression by acting at ease and blissful.

Referring to this background, we see an individual who reached out for alcohol and on occasion, street

> drugs to anesthetize his brain so that he could survive . . . . His miserable level of functioning both academically and socially and for that matter with his parents substantiates these notions. At the time of the crime it is my carefully considered opinion that he was suffering from a severe mental disorder—being close to psychosis—major depression, 296.3, with a mixed personality disorder, 301.89, with narcissistic, passive aggressive, and impulsive features.

The psychiatrist concluded by recommending that Follett be subjected to "a mandatory treatment program with sufficient psychotropic medication to allow him to contain his regressed, primitive impulses long enough to achieve a corrective emotional experience with insights at an emotional level, and therefore to function in a more reasonable adult manner. Such a program should be measured in years . . . ." The government presented no medical testimony at the sentencing hearing.

While I have great respect for the district court, I do not believe that the Sentencing Guidelines permit a judge to substitute its judgment as to mental condition for that of medical experts, absent a basis in the record for so doing.

I would therefore remand the matter and instruct the district court to consider fully Follett's medical disorders, to permit the government to present any testimony that it sees fit, and to resentence on the basis of the full record.

It is clear that the prison authorities cannot require Follett to take medication unless that refusal constitutes a danger to himself or others in the environment in which he is confined. *See Washington v. Harper*, 110 S. Ct. 1028, 1039-40 (1990). They can, however, place him in a facility where psychiatric treatment and counselling are available permitting Follett the opportunity to take advantage of

medical treatment to improve his ability to function with society.

I, of course, have no objection to a lengthy period of controlled supervision after he is released, conditioned upon his refraining from the use of alcohol and drugs and continuing in a medically recommended program of psychiatric treatment.

Finally, I recognize the limitations that the Guidelines place on all of us, but district courts must exercise their obligation to depart from the Guidelines when the circumstances warrant such a departure. Otherwise, we will have a completely mechanized sentencing process that will not accomplish any of the goals established by Congress in adopting the Guidelines and substitute blind acquiescence and injustice for discretion and justice. Here, a departure will serve the interests of society and the defendant better than the sentence imposed.

A true copy.

Attest: _____

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

[FILED AUGUST 18, 1989]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

Case Number Cr. 89-46

UNITED STATES OF AMERICA

v.

MATTHEW FOLLETTE

Jeffrey B. Steinbeck,
Geena Cohen and Ronald L. Wheeler
Defendant's Attorney

☒ pleaded guilty to count 1.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:841(a)(1) and 841(b)(1)(B)(v)	Possess with intent to distribute LSD	1

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) NA (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☐ It is ordered that the defendant shall pay to the United States a special assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by the Judgment are fully paid.

* * * * *

Date of Imposition of Sentence August 18, 1989
Signature of Judicial Officer /s/ Charles R. Wolle
Name & Title of Judicial Officer Charles R. Wolle, U.S. District Judge
Date August 18, 1989

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of eighty four (84) months.

☐ The Court makes the following recommendations to the Bureau of Prisons:
☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

a.m.
☐ at _____ p.m. on _____.
☐ as notified by the Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☒ before 1 p.m. on Sept. 19, 1989.
☒ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $20,050.00, consisting of a fine of $20,000.00 and a special assessment of $50.00.

☐ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid ☐ immediately. ☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

IT IS FURTHER ORDERED that defendant shall pay $1,210.05 per month for costs of incarceration.

IT IS FURTHER ORDERED that defendant shall pay $91.66 for each month of supervised release for a total amount of $4,399.68.

APPENDIX C

United States Court of Appeals
For The Eighth Circuit

No. 89-2386SI

United States of America,

Appellee,

vs.

Matthew Follett,

Appellant.

Appeal from the United States District Court
for the Southern District of Iowa

Appellant's petition for rehearing, although received untimely, will be accepted and filed. The petition is, however, denied on the merits.

July 5, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit.

(2)

No. 90-590

In the Supreme Court of the United States

OCTOBER TERM, 1990

MATTHEW FOLLETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether, in determining the weight of lysergic acid diethylamide (LSD) for sentencing purposes, the court correctly considered the combined weight of the LSD and the blotter paper used as a carrier medium for the drug.

2. Whether the court of appeals erred in declining to review the district court's refusal to depart downward from the indicated Sentencing Guidelines range.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-590

MATTHEW FOLLETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 905 F.2d 195.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1990. A petition for rehearing was denied on July 5, 1990. Pet. App. 15. The petition for a writ of certiorari was filed on October 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Iowa to a single count of possessing lysergic acid diethylamide

(LSD) with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to a term of 84 months' imprisonment, to be followed by a four-year term of supervised release, and he was fined $20,000. The court of appeals affirmed. Pet. App. 9-14.

1. The pertinent facts are summarized in the opinion of the court of appeals. William Emanuel was arrested for distributing LSD in and around Iowa City, Iowa. Following his arrest, Emanuel telephoned petitioner, who distributed LSD supplied by Emanuel, to discuss a drug transaction. Petitioner told Emanuel that he had sold 20 sheets of blotter paper imbedded with LSD within the past week and, in addition, had customers waiting to purchase approximately 15-30 sheets of LSD. Emanuel replied that because of his arrest he did not want to "touch anything." Petitioner therefore agreed to deal directly with Emanuel's supplier in California; however, no transaction was arranged, since the California supplier refused to deal with anyone connected with Emanuel after Emanuel's arrest. Emanuel ultimately agreed to cooperate with law enforcement authorities. Although no controlled purchase was ever made from petitioner, Emanuel testified before the grand jury that he had sold petitioner approximately 2,500 dosage units of LSD. Pet. App. 2.

2. Petitioner was initially charged with possessing more than ten grams of LSD with the intent to distribute it[1] and with conspiring to distribute LSD. Pursuant to plea negotiations, petitioner subse-

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[1] Under 21 U.S.C. 841(b)(1)(A)(v), anyone who commits an offense involving "10 grams or more of a mixture or substance containing a detectable amount of [LSD]" is subject to a mandatory minimum term of ten years' imprisonment.

quently pleaded guilty to a one-count information charging him with possessing with the intent to distribute 2,500 dosage units of LSD. Under the terms of the plea agreement, it was stipulated (subject to petitioner's objection to counting the weight of the carrier medium when determining the total quantity of the drug involved) that petitioner possessed in excess of one gram of a mixture or substance containing LSD, that he could have reasonably foreseen a total quantity of 7-9.9 grams of LSD, and that he had accepted responsibility for his criminal conduct.[2] Pet. App. 2-3.

At the sentencing hearing, the district court found that the base offense level under the Sentencing Guidelines, see United States Sentencing Comm'n, *Guidelines Manual* § 2D1.1(a)(3) Drug Quantity Table (Nov. 1, 1990), based on the stipulated combined weight of the LSD and the carrier medium, was level 30. The court gave petitioner a two-level reduction in the offense level for accepting responsibility, but found that no other adjustments were appropriate. Petitioner was thus subject to a Guidelines range of 78-97 months' imprisonment, and his 84-month sentence was within that range. Pet. App. 3.

Petitioner moved that the district court depart downward from the indicated Guidelines range on the basis of his asserted diminished mental capacity at the time of the offense. See Guidelines § 5K2.13.[3]

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[2] Under 21 U.S.C. 841(b)(1)(B)(v), anyone committing an offense involving one gram or more but less than ten grams of a mixture or substance containing LSD is subject to a mandatory minimum term of five years' imprisonment.

[3] Sentencing Guidelines § 5K2.13 provides:

> If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not

In support of his motion, petitioner presented evidence showing that he had a history of psychological problems. In particular, the evidence showed that petitioner maintained "only superficial emotional interests in people, situations, [and] events" and that, at the time of the crime, he suffered from "a severe mental disorder—being close to psychosis—major depression, * * * with a mixed personality disorder, * * * with narcissistic, passive aggressive, and impulsive features." Pet. App. 5, 7. The evidence also showed that petitioner had long abused alcohol and drugs, but had refused to undergo treatment to improve his condition. *Id.* at 5. Finally, the evidence showed that petitioner was of above average intelligence and had "no cognitive deficiencies in his ability to calculate, in his fund of knowledge, in his orientation or in his memory." *Ibid.*

After considering the psychological evidence, the district court declined to depart below the indicated Guidelines range. The court imposed a sentence of 84 months' imprisonment.

3. The court of appeals affirmed. Pet. App. 1-8. First, the court held that the district court's refusal to depart below the indicated Guidelines range was "not reviewable on appeal." *Id.* at 3. Second, the court of appeals held that LSD carrier mediums constitute "mixture[s] or substance[s] containing a detectable amount" of the drug and therefore must be included in calculating the drug's weight. *Id.* at 4.

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resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

Judge Heaney dissented. In his view, petitioner's 84-month term of imprisonment was "an inordinately long sentence for a 19-year-old first offender." Pet. App. 5. Stating that "a departure w[ould] serve the interests of society and the defendant better than the sentence imposed," *id.* at 8, Judge Heaney would have remanded the case for resentencing to consider petitioner's mental condition. *Id.* at 7.

ARGUMENT

1. The first question presented in the petition is the same as one of the questions presented in *Chapman* v. *United States*, cert. granted, No. 90-5744 (Dec. 10, 1990). The petition should therefore be held pending this Court's decision in *Chapman*, and then should be disposed of as appropriate in light of that decision.

2. Petitioner also contends that the court of appeals erred in holding that it lacked authority to review the decision of the district court to impose a sentence within the indicated Guidelines range rather than to depart downward from the Guidelines. Pet. 11-13. Petitioner's claim lacks merit in two respects.

a. First, it is axiomatic that there is no right of appeal in criminal cases absent explicit statutory authorization. See, *e.g.*, *United States* v. *DiFrancesco*, 449 U.S. 117, 131 (1980); *Abney* v. *United States*, 431 U.S. 651, 656 (1977). Prior to the enactment of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.* and 28 U.S.C. 991-998, appellate courts generally lacked authority to review sentences imposed within the range provided by statute. *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972). The Sentencing Reform Act expanded appellate review of

sentences but limited that review to certain categories of claims. Under 18 U.S.C. 3742(a), a defendant may challenge his sentence on appeal on the grounds that it "(1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater than the sentence specified in the applicable range * * *; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." Petitioner has failed to show that his claim (*i.e.*, that the district court failed to depart below the indicated Guidelines range) fits into any of those categories of reviewability.

Petitioner's sentence was not imposed in violation of law within the meaning of subsection (a)(1) of 18 U.S.C. 3742 since his sentence was well within the statutory maximum of 40 years' imprisonment authorized by 21 U.S.C. 841(b)(1)(B)(v). Moreover, petitioner's sentence was not reviewable under subsections (a)(3) or (a)(4) of 18 U.S.C. 3742 because there is a specific Guideline provision for drug offenses, see Guidelines § 2D1.1, and petitioner's sentence was within the applicable Guidelines range specified for his offense. Finally, petitioner cannot claim that his sentence was imposed as a result of an incorrect application of the Guidelines within the meaning of subsection (a)(2) of 18 U.S.C. 3742: taken together, 18 U.S.C. 3553(b) and Guidelines § 5K2.13 provide that a district court "may" depart below the Guidelines range as a matter of discretion if there are extraordinary circumstances showing that the defendant's reduced mental capacity contributed to the commission of his offense. In this case, the district court did not refuse to depart below the recommended Guidelines range on the ground that

the court lacked the authority to do so; rather, after considering petitioner's evidentiary submissions, the court refused to depart downward because, in the court's view, none of the mitigating evidence submitted by petitioner warranted a downward departure.

In comparable circumstances, every court of appeals that has considered this question has held that the discretionary refusal by a sentencing judge to depart downward from the applicable Guidelines range is not reviewable on appeal under 18 U.S.C. 3742(a). *United States* v. *Tucker*, 892 F.2d 8, 9-11 (1st Cir. 1989); *United States* v. *Colon*, 884 F.2d 1550, 1552 (2d Cir.), cert. denied, 110 S. Ct. 553 (1989); *United States* v. *Denardi*, 892 F.2d 269, 272 (3d Cir. 1989); *United States* v. *Bayerle*, 898 F.2d 28, 30-31 (4th Cir.), cert. denied, 111 S. Ct. 65 (1990); *United States* v. *Draper*, 888 F.2d 1100, 1105 (6th Cir. 1989); *United States* v. *Franz*, 886 F.2d 973, 976 (7th Cir. 1989); *United States* v. *Evidente*, 894 F.2d 1000, 1003-1005 (8th Cir.), cert. denied, 110 S. Ct. 1956 (1990); *United States* v. *Morales*, 898 F.2d 99, 102-103 (9th Cir. 1990); *United States* v. *Soto*, No. 89-2254 (10th Cir. Nov. 8, 1990), slip op. 3-4; *United States* v. *Fossett*, 881 F.2d 976, 979-980 (11th Cir. 1989); *United States* v. *Ortez*, 902 F.2d 61, 63-64 (D.C. Cir. 1990). See also *United States* v. *Rojas*, 868 F.2d 1409, 1410 (5th Cir. 1989); *United States* v. *Buenrostro*, 868 F.2d 135, 139 (5th Cir. 1989), cert. denied, 110 S. Ct. 1957 (1990); *United States* v. *Wright*, 895 F.2d 718, 722 (11th Cir. 1990). This Court recently declined to review this issue in *Conway* v. *United States*, cert. denied, 111 S. Ct. 258 (1990). Further review of this issue is therefore unwarranted.

b. Even if petitioner's claim were subject to review on appeal, petitioner could not prevail. Guidelines § 5K2.13 provides that a district court "may" depart below the indicated Guidelines range only if the defendant has "committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants" and then only to "the extent to which reduced mental capacity contributed to the commission of the offense." Rather than showing that petitioner suffered from "significantly reduced mental capacity," the evidence proffered by petitioner showed that petitioner was of above average intelligence and had "no cognitive deficiencies." Pet. App. 5. He also had a long and persistent history of voluntary drug and alcohol abuse for which he had refused treatment to improve his condition. *Ibid.* Thus, petitioner did not qualify for a departure under the terms of Guidelines § 5K2.13. At most, petitioner demonstrated that he had a history of psychological and emotional problems. But as Guidelines § 5H1.3 makes clear, "[m]ental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines." The district court therefore did not abuse its discretion in refusing to depart below the indicated Guidelines range.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Chapman* v. *United States*, cert. granted, No. 90-5744 (Dec. 10, 1990), and then should be disposed of as appropriate in light of that decision. In all other respects the petition should be denied.

Respectfully submitted.

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DECEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20234